Petition

81-1688

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

IN THE MATTER OF ALBERT B. GERBER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Pennsylvania violated the due process and equal protection clauses of the Fourteenth Amendment by failing to furnish any reason for its refusal to reinstate an attorney who resigned from the bar and who has complied with all requirements for reinstatement and who has been recommended for reinstatement by the Hearing Committee and the State Disciplinary Board (both twice) in accordance with the procedures promulgated by the said Court.

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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

In the Matter of ALBERT B. GERBER

ON PETITION FOR WRIT
OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

To the Justices of the Supreme Court of the United States:

The petitioner, Albert B. Gerber, respectfully prays that a Writ of Certiorari issue to review the Order of the Supreme Court of Pennsylvania entered in this proceeding on October 30, 1981 and the Order of said Court of December 10, 1981 denying the Application for Reargument, Reconsideration and Oral Argument.

OPINIONS BELOW

1. There is no opinion of the Supreme Court of Pennsylvania. The orders for review appear at pages A1 and A2 of the Appendix.

The recommendation of the Disciplinary Board of Pennsylvania dated May 27, 1981 is set forth at page A3 of the Appendix.

JURISDICTION

The petition for reinstatement was denied on October 30, 1981. An Application for Reargument, Reconsideration and Oral Argument was filed on November 13, 1981 which, in accordance with State Law stayed the Order. The said Application was denied December 10, 1981. This petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

APPLICABLE CONSTITUTIONAL PROVISIONS

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

RULES OF THE PENNSYLVANIA SUPREME COURT APPLICABLE

The Pennsylvania Rules of Disciplinary Enforcement provide in part:

Rule 218. Reinstatement

* * * *

(c)(1) Petitions for reinstatement by formerly admitted attorneys shall be filed with the Board.

(2) Upon receipt of the petition the Board shall refer the petition to a hearing committee in the disciplinary district in which the respondent-attorney maintained an office at the time of the disbarment, suspension or transfer to inactive status. If any other formal disciplinary proceedings are then pending or have been authorized against the formerly admitted attorney, the reinstatement and disciplinary matters may be heard by the same hearing committee. In such case the combined hearing shall be held not later than 45 days after receipt by the Board of the petition for reinstatement.

(3) The hearing committee shall promptly schedule a hearing at which:

(i) A disbarred or suspended attorney shall have the burden of demonstrating by clear and convincing evidence that such person has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth and that the resumption of the practice of law within the Commonwealth by such person will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest.

(ii) A formerly admitted attorney who has been on inactive status shall have the burden of demonstrating that such person has the moral qualifications, competency and learning in the law required for admission to practice in the Commonwealth.

(4) At the conclusion of the hearing, the hearing committee shall promptly file a report containing its findings and recommendations and transmit same, together with the record, to the Board.

(5) The Board shall review the report of the hearing committee and the record and shall promptly file its own findings and recommendations, together with the brief, if any, before the Board, and the entire record with the Supreme Court.

(6) The Supreme Court shall review the record and enter an appropriate order. Unless otherwise ordered, matters arising under this rule will be considered without oral argument.

STATEMENT OF THE CASE

Petitioner in October of 1971 pleaded guilty to violations of the Federal Securities Act. He voluntarily resigned from admissions to practice in all courts. His resignation was accepted by the Supreme Court of Pennsylvania in April of 1972.

In January of 1976 he filed a petition for reinstatement in accordance with the Pennsylvania

Rules, *supra*, promulgated by the Pennsylvania Supreme Court. In accordance with those rules a Hearing Committee took testimony and recommended to the Disciplinary Board that he be reinstated. The said Board accepted the report and recommended to the Supreme Court that Petitioner be reinstated. On January 9, 1978 the Supreme Court rejected the recommendation without furnishing any reason. (Two Justices dissenting.)

On November 3, 1978 Petitioner again filed a Petition for Reinstatement. A new Hearing Committee was appointed which held hearings and recommended reinstatement. The Disciplinary Board accepted the Committee's report and recommended to the Supreme Court that Petitioner be reinstated. On October 30, 1981 the Court denied the petition again without assigning any reason. (One Justice dissenting.) On November 13, 1981 Petitioner filed an Application for Reargument, Reconsideration and Oral Argument, pointing out that the action of the Court violated the Due Process Clause and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

The Court denied the Application (without assigning reasons) on December 10, 1981. (Justice Nix stating he would grant reconsideration or, at the very least, allow oral argument.)

FEDERAL QUESTION RAISED

Petitioner's first opportunity to raise the federal question was in the Application for Reargument, Reconsideration and Oral Argument. In that application all the cases, quotations and arguments set forth hereafter under the Section entitled "reasons for granting the writ" are set forth. The Supreme Court of Pennsylvania ignored the issue raised and denied the application without comment or reason. This was the first opportunity the petition had to raise the federal question and therefore it was timely and properly raised in order to give this

court jurisdiction to review the order on writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Pennsylvania has decided an important question of federal law in a way which is in direct conflict with a number of applicable decisions of this court.

This Court has held in *Schware vs. Board of Examiners of New Mexico*, 353 U.S. 232 (1957) that a State cannot exclude an individual from the practice of the law for reasons which contravene the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. In that case this Court stated:

> A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment. (At pages 238-239)

The Supreme Court of Pennsylvania by its action in the instant in twice denying the petitioner the right to practice law without assigning any reason whatsoever is treating the right to practice law as a matter of grace. This is in direct conflict with the decision of this Court in *Baird v. State Bar of Arizona*, 401 U.S. 1 (1970) where this Court stated:

> The practice of law is not matter of grace, but of right for one who is qualified by his learning and moral character. (At page 8)

By its refusal twice to give any reason for denying Petitioner the right to practice law the Supreme Court of Pennsylvania has violated the ruling of this court in *Schware vs. Board of Examiners of New Mexico, supra.* where this Court stated "that a person cannot be pre-

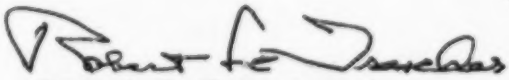
vented from practicing law except for valid reasons. Certainly the practice of law is not a matter of the State's grace." (At page 239, footnote 5)

Most recently this Court ruled in *Application of Griffiths*, 413 U.S. 717 (1973), that a state court may not refuse an applicant the right to practice law without a valid reason. In the instant case the Supreme Court of Pennsylvania has not only not given a valid reason but refuses to give any reason whatsoever.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the orders of the Supreme Court of Pennsylvania.

Respectfully submitted,



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Appendix

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA

In the Matter of:	:	No. 173 Misc.
	:	Dkt. No. 19
ALBERT B. GERBER	:	
(Montgomery County)	:	
	:	
PETITION FOR	:	
REINSTATEMENT	:	(Board No. 2 DB 76)

ORDER

AND NOW, this 30th day of October, 1981, the Recommendation of the Disciplinary Board dated May 27, 1981, is rejected and the Petition for Reinstatement is denied.

The expenses incurred by the Board in the investigation and processing of the Petition for Reinstatement shall be paid by the petitioner.

By the Court:

. . . . . .
Chief Justice

Mr. Justice Nix would accept the Recommendation of the Disciplinary Board.

TRUE COPY FROM RECORD
Attest: 11/2/81

. . . . . .
Carl Rice, Esq.
Prothonotary

SUPREME COURT OF PENNSYLVANIA
Eastern District

December 11, 1981

CARL RICE, ESQ.
PROTHONOTARY

468 CITY HALL
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(215) 496-4600

Robert L. Trescher, Esq.
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Philadelphia, PA 19102

RE: Albert B. Gerber
(Montgomery County)
No. 173, Miscellaneous Docket #19
(Board No. 2 DB 76)

Dear Mr. Trescher:

This is to advise you that the Court has endorsed the following order on Application for Reargument, Reconsideration and Oral Argument, filed in the above matter:

December 10, 1981
Application denied.
s/ *Per Curiam*
Mr. Justice Nix would grant reconsideration, or, at the very least, allow oral argument.

Very truly yours,

. . . . . .
Prothonotary

/diS
cc: Allen B. Zerfoss, Esq., Chief Counsel
Mrs. Nan M. Cohen, Secretary of the Board
John W. Herron, Esq., Asst. Disc. Counsel

THE DISCIPLINARY BOARD
OF THE
SUPREME COURT OF PENNSYLVANIA

100 Pine Street
Harrisburg, Pennsylvania 17101
(717) 232-7525

May 27, 1981

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Nan M. Cohen

Members of the Board
Charles V. Henry, III,
Chairman
John C. Anderson,
Vice-Chairman
Dennis C. Harrington
Herbert J. Johnson, Jr.
Raymond Pearlstine
Pasco L. Schiavo
Frank J. McDonnell
Mary Bell Hammerman
Robert C. Daniels
John M. Elliott
Sidney L. Krawitz
Nancy M. Neuman
Winfield Keck

Honorable Henry X. O'Brien
Chief Justice of Pennsylvania
Supreme Court of Pennsylvania
464 City Hall
Philadelphia, PA 19107

RE: In the Matter of ALBERT B. GERBER
(Montgomery County)
PETITION FOR REINSTATEMENT
No. 713, Miscellaneous Docket No. 19
Supreme Court
No. 2 DB 76 — Disciplinary Board
Attorney Registration No. 03520

Dear Chief Justice O'Brien:

In accordance with the provisions of Rule 218(c) of the Pennsylvania Rules of Disciplinary Enforcement, I am enclosing the record in the above proceeding together with the original and seven copies of the Report and Recommendations of the Disciplinary Board.

Copies of the Report and Recommendations are being served by certified mail upon the Petitioner, Counsel for Petitioner, and upon the Office of Disciplinary Counsel. Information copies are likewise being transmitted to the members of the Hearing Committee so that they may be advised of the action of the Board in this proceeding.

Respectfully yours,

.....

Nan M. Cohen
Secretary

NMC/np
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Counsel for Petitioner (with enclosure)
Allen B. Zerfoss, Esq.,
Chief Disciplinary Counsel
(with enclosure)
John W. Herron, Esq.,
Assistant Disciplinary Counsel
(with enclosure)
Members of Hearing Committee 1.04
Perry S. Bechtle, Esq., Chairman
Herbert J. Hutton, Esq., Member
Louis W. Fryman, Esq., Member

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

In the Matter of:	:	
	:	
ALBERT B. GERBER	:	NO. 713, Misc., Dkt.
(Montgomery County)	:	No. 19 Supreme Court
	:	NO. 2 DB 76
Petition for	:	
Reinstatemcnt	:	

REPORT AND RECOMMENDATION OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 218 (c) (5) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania submits its findings and recommendations to your Honorable Court with respect to the above Petition for Reinstatement.

I. HISTORY OF PROCEEDINGS:

Petitioner's resignation from the Courts of Pennsylvania was accepted by the Supreme Court on April 28, 1972 following his conviction in October of 1971 of violating the Federal Securities Act. As a result of that conviction, he was sentenced to probation for five years by the United States District Court for the Eastern District of Pennsylvania. Petitioner's probation was terminated in October of 1975. He filed a Petition for Reinstatement on January 26, 1976 after which a Hearing Committee took testimony and recommended that he be reinstated. The Disciplinary Board thereafter agreed with the Hearing Committee's report and recommended that the Petitioner be reinstated.

On January 9, 1978, the Supreme Court rejected the recommendation of the Disciplinary Board and denied the Petition for Reinstatment. On November 3, 1978, the Petitioner again filed a Petition for Reinstatement. The matter was assigned to a Hearing Committee consisting of Perry S. Bechtle, Esquire, Herbert J. Hutton, Esquire and Louis W. Fryman, Esquire. After hearing testimony for several days, the Hearing Committee recommended that the Petitioner be reinstated.

II. DISCUSSION.

Under Rule 218 of the Pennsylvania Rules of Disciplinary Enforcement, a person who petitions for reinstatement must demonstrate that he or she has the moral qualifications, competency, and learning in the law required for admission to practice in the Commonwealth.

At the hearing the Petitioner established that he has not been engaged in the practice of the law since his resignation. There was no evidence that he had held himself out as a lawyer or that he has used any stationery designating himself as a lawyer. Disciplinary counsel cross-examined the Petitioner at great length and could not establish that he was practicing law or holding himself out as a lawyer at any time during the eight years since his resignation. The Petitioner testified that he kept abreast of the law by doing research and brief writing for other lawyers and regularly reviewing advance sheets and legal periodicals, including law reviews. Numerous character witnesses were called attesting to the Petitioner's integrity and good reputation in the community. He has been active in his community affairs and has been the commander of a disabled veterans post in his home area. Prior to his conviction in Federal Court, the Petitioner enjoyed an excellent reputation as a lawyer.

Petitioner is in his late 60's; is married with three children and three grandchildren. The record substantiates the conclusion of the Hearing committee that the Petitioner has the moral qualifications, competency, and learning in the law required for admission to the practice in the Commonwealth. Therefore, the recommendation of the Hearing Committee is adopted by the Board and it is recommended that the Petitioner be reinstated by your Honorable Court.

III. CONCLUSION.

The Board recommends to your Honorable Court that Albert B. Gerber be reinstated to the practice of law pursuant to Rule 218 of the Pennsylvania Rules of Disciplinary Enforcement upon payment of the necessary expenses incurred in the investigation and processing of the petition as set forth on the attached schedule pursuant to Rule 218 (e).

Respectfully submitted,
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By .....
Frank J. McDonnell, *Member*

Date: May 27, 1981

Messrs. Johnson, Pearlstein, Schiavo and Elliott did not participate in the adjudication.

Qpposition

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FILED
JUN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

IN THE MATTER OF ALBERT B. GERBER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 81-1688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

To the Chief Justice & Justices of the Supreme Court of the United States:

IN THE MATTER OF ALBERT B. GERBER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully requests that the Petition for Writ of Certiorari be denied and offers as reasons therefore, the following:

COUNTER-STATEMENT OF THE MATERIAL FACTS

The Petitioner's resignation from the courts of Pennsylvania was accepted with prejudice by the Supreme Court of Pennsylvania on April 28, 1972 and his name stricken from the roll of members of the bar of the Supreme Court of Pennsylvania until further order of the Court. (In the Supreme Court of Pennsylvania, E.D. No. 173, Misc. Dkt. No. 19). The resignation followed a plea of guilty in October, 1971 by Petitioner in the United States District Court for the Eastern District of Pennsylvania, to the offenses of fraud in the offer and sale of securities, false statements to the Securities & Exchange Commission and conspiracy. On January 19, 1972, Petitioner was placed on probation for a period of five years, which probation was terminated in October, 1975.

A Petition for Reinstatement was filed January 26, 1976. In accordance with Pennsylvania Rules of Disciplinary Enforcement, Rule 218 (Reinstatement), a Hearing Committee took testimony and recommended to the Disciplinary Board of the Supreme Court of Pennsylvania that the Petitioner be reinstated. Hearings by the full Hearing Committee were held on September 14, 1976, September 20, 1976 and October 18, 1976. Petitioner was represented by counsel at his hearings. The Hearing Committee filed its Report on September 28, 1977 recommending that the Petitioner be reinstated. The Disciplinary Board accepted the Report and recommended to the Supreme Court of Pennsylvania that Petitioner be reinstated. On January 9, 1978, the Supreme Court of Pennsylvania rejected the recommendation of the Board.

The record before the state supreme court consisted of two hundred seventy five pages of transcribed testimony and hundreds of pages of exhibits. Among those exhibits were the Findings of Fact and Conclusions of Law of Judge James H. Gorbey of the United States Dis-

trict Court for the Eastern District of Pennsylvania, filed in *Bellis, et al. v. Thal and Gerber* 373 F.Supp. 120 (1974), aff'd 510 F.2d 969. The plaintiffs were trustees in the consolidated reorganization proceedings of Commonwealth Financial Corporation, Neighborhood Finance Co., Inc., Neighborhood Finance Co., Inc. of Pennsylvania and Quaker City Investment Corporation, under Chapter X of the Bankruptcy Act, pending in the federal Eastern District Court, Cause No. 30108. The defendants, among them Petitioner, were officers, directors and dominant shareholders of these corporations and were charged with breach of fiduciary duty, mismanagement, diversion of assets and self-dealing, involving Commonwealth Financial Corporation, its subsidiaries and other companies which the defendants dominated and controlled. The case was tried before the Eastern District Court without a jury. Judge Gorbey found *inter alia,* with respect to certain transactions, that Petitioner and co-defendant "prior to abandoning the sinking ship, were attempting to divert every penny of assets remaining in Commonwealth that they could possibly get away with" 373 F.Supp. at 132. Judge Gorbey found further "that the defendants' actions in all of these foregoing transactions were willful and malicious and caused substantial injury to Commonwealth and its subsidiary corporation" 373 F.Supp. at 133. The federal judge ordered that judgment be entered for the plaintiffs and against the defendants in the amount of $1,267,560.02, with costs and interest.

Of record as well before the state supreme court was a complaint filed by Bellis, trustee for Commonwealth Financial Corporation, etc. against Petitioner Gerber and his wife in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 74-3248. The Petitioner was alleged to have transferred personal property including monies and various securities by placing the property in joint tenancy with his wife in anticipation that he would be held answerable for his con-

duct in the management of Commonwealth Financial Corporation and its subsidiaries, which conduct ultimately gave rise to the judgment in *Bellis, et al. v. Gerber, et al.*, supra. The purpose and result of the transfers by Gerber were alleged to have been to defraud the plaintiff and hinder and delay the collection of indebtedness by leaving Gerber without sufficient assets and property to satisfy said indebtedness. The plaintiffs in the fraud action filed a set of interrogatories to the then defendant Gerber. Gerber declined to answer the interrogatories on the grounds that the complaint in the case charged him with the commission of a crime under the law of the Commonwealth of Pennsylvania and the interrogatories were intended to prove the commission of the acts which would constitute such a crime, and consequently, the defendant believed that he was not required to answer the interrogatories on the ground that his answers might tend to incriminate him. Gerber thereafter settled Civil Action 74-3248 by paying $32,500 to the plaintiff.

On November 3, 1978, Petitioner Gerber again filed a Petition for Reinstatement. A new Hearing Committee was appointed which held hearings for several days and recommended reinstatement. Testimony from the hearings occupied hundreds of pages of transcript made a part of the record before the state supreme court. All matters were fully briefed by the Petitioner by way of counsel in a thirty seven page brief. The Office of Disciplinary Counsel filed a responsive fifteen page brief. The Petitioner by counsel filed in reply a fourteen page brief. The Disciplinary Board accepted the Hearing Committee's Report and recommended to the Supreme Court that Petitioner be reinstated. On October 30, 1981, the state supreme court denied the Petition.

Petitioner petitioned the state supreme court for reconsideration and oral argument. The Disciplinary Counsel answered the Petition for Reconsideration. In that Answer the Disciplinary Counsel responded that

the decision of the state supreme court to deny reinstatement without opinion was not a denial of due process as charged by Petitioner, especially since he had a full and fair hearing. Disciplinary Counsel alleged that the record was replete with unfavorable evidence which the Petitioner should recognize. The Report of the Hearing Committee as accepted by the Disciplinary Board in its Report was not an unqualified endorsement of Petitioner and provided, according to Disciplinary Counsel, a sufficient evidentiary basis for denying reinstatement. The Hearing Committee, *inter alia*, found as a fact that Petitioner failed to correctly respond to Question 11 of the reinstatement questionnaire by not revealing certain civil litigation in which he was involved as a party, and that Petitioner, on one occasion, refused to answer interrogatories addressed to him on the ground that his answers might tend to incriminate him. The civil litigation in question was a direct outgrowth of Petitioner's conviction for violating the Federal Securities Act (15 U.S.C. §77a and 18 U.S.C. §371). The Hearing Committee further found that Petitioner did not completely divorce himself from his former law practice. Finally, the Hearing Committee specifically concluded that "the facts are mixed." Thereafter, the court denied the Application for Reconsideration and Oral Argument on December 10, 1981.

Petitioner here claims that the state supreme court violated the due process and equal protection clauses of the Fourteenth Amendment by failing to furnish any reason for its refusal to reinstate him.

ARGUMENT

Petitioner presents no substantial federal question.

It must be conclusively presumed that the order of the state supreme court denying reinstatement to Petitioner was rendered on the basis of the entire state court record. The absence of an opinion issued by the court does not mitigate the effects of this presumption. *Michigan Central Co. v. Mix,* 49 S.Ct. 207, 278 U.S. 492, 73 L.Ed. 470 (1927). See also *Grubb v. Public Utilities Commission of Ohio,* 50 S.Ct. 374, 281 U.S. 470, 74 L.Ed. 972 (1930). It must be presumed as well that the state supreme court, being apprised of possible constitutional defects of the procedures called into question by the Petitioner, considered the claim of unconstitutionality to be without merit. Comity requires a federal court to assume that a state will perform its duty to uphold the Constitution to the best of its ability. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), *Cousins v. Wigoda,* 463 F.2d 603 (7th Cir. 1972); application for stay denied, 409 U.S. 1201, 92 S.Ct. 2610, 34 L.Ed.2d 15 (1972). cf. *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977). There is no constitutional right to an opinion from the state supreme court in an admissions matter. The procedure required to afford due process of law is not of a fixed and invariable character; rather, the basic elements are notice and the opportunity to be heard by a fair and impartial tribunal legally constituted and having jurisdiction over the case. *Sill v. Pennsylvania State University,* 462 F.2d 463 (3d Cir. 1971).

The standard of review by the state supreme court in reviewing the Disciplinary Board Report and Recommendation is *de novo,* and the state supreme court is not bound by findings of either the Hearing Committee or the Disciplinary Board; however, the court is guided by decisions of such triers of fact to credit certain testimony

and discount other testimony. *Office of Disciplinary Counsel v. Walker*, 469 Pa. 432, 366 A.2d 563 (1976). As the court's review is *de novo*, it is not bound by the findings of the prior proceeding but is free to evaluate the evidence presented in the record as it sees fit. *Krehel Appeal*, 419 Pa. 86, 213 A.2d 375 (1965). The use of masters or referees as advisory triers of fact is a well established instrument of a busy court exercising original jurisdiction. The United States Supreme Court itself utilizes the practice when disputed factual issues appear in original actions. R. Stern and E. Gressman, Supreme Court Practice, §10.12 at 407 to 408 (4th Ed. 1969).

Except as required by provisions of state constitutions or statutes, opinions of courts need not be written by the court or judge. 21 C.J.S. §217(b). In the case of *Vaughn v. Harp*, 49 Ark. 160, 4 S.W. 751 (1886), the Supreme Court of Arkansas observed:

> The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the judges, and taken down by the reporters in shorthand. (*1 Blackstone, 71.*)
>
> In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depths of all the reasons of the case in question, but in their judgments express not any; and, in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the Commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence;* and this is worthy for learned and grave men to imitate." *Coke's Reports, part 3, pref.* 5.

> The opinions of the judges, setting forth the reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the court, and should guide litigants; and right-minded judges, in important cases — when the pressure of other business will permit — will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and, if one is given, whether it shall be orally or in writing. In the exercise of that discretion, the authority of the court is absolute.

49 Ark. at 163.

Recent decisions from many jurisdictions, both state and federal, continue to reiterate this well articulated view of the purposes of written opinions.

The Fifth Circuit Court of Appeals enumerated several purposes of judicial opinions. The court observed that articulated discussion of the factors, legal, factual or both, which lead the court to one rather than another result, give strength to the system and reduces if not eliminates, the tendency to arbitrary action by those having the power of almost final review. The court observed as well that the very discursive statement of these articulated reasons is the thing out of which law grows. This statement is an essential part of the process of the creation of principles on which predictions can fairly be forecast. *N.L.R.B. v. Amalgamated Clothing Workers of America, AFL-CIO, L.* 430 F.2d 990 (5th Cir. 1970).

Nowhere in this opinion was it observed that a constitutional requirement dictated that a written opinion be provided a litigant.

In the Case of *Cook v. Hirschberg*, 258 F.2d 56 (2d Cir. 1958), the court stated:

> [A]ppeals have to be taken from final judgments, not from judicial rationales. And court judgments may of course be supported by sound judicial argumentation — or by none at all if they are correct legally. Judges have at least the solace of knowing that only judicial deeds — not judicial words — may constitute legal error.

Thus it is that in the absence of some positive requirement, it is not necessary that a court rendering a decision should in all cases give a written opinion or even state the reasons for the conclusion reached. *American National Bank and Trust Co. v. Pennsylvania Railroad Co.*, 40 Ill. 2d 186, 238 N.E. 2d 385 (1968). The matter is in the discretion of the court, See *Hughes v. Pennsylvania Railroad Co.*, 409 F.2d 460 (D.C. Cir. 1969), and has ofttimes been exercised expressly as the following examples illustrate.

Where a federal trial court agreed with the conclusions of the master in a patent infringement case an opinion giving the grounds for decision was held not to be obligatory. *Joyce Inc. v. Fern Shoe Co.*, 32 F.Supp. 401, 404 (S.D. Cal. 1940), remanded 116 F.2d 498 (1940). So also where a federal court denied a motion to dismiss an indictment on the ground that the statute upon which it was predicated was constitutionally defective, the court found that it was under no obligation to file a written opinion explaining its decision on any motion. *United States v. Pastor*, 419 F.Supp. 1318 (S.D.N.Y. 1975). This Court found that a court need not elaborate or give reasons for rejection claims which it regards as frivolous or totally without merit. *Sumner v. Mata*, 101 S.Ct. 764, 449 U.S. 539, 66 L.Ed. 2d 722

(1981). The Supreme Court of Pennsylvania as well has found that a written decision of the court is not a constitutional right. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968)

The court in the case of *United States ex rel Travis v. Travis*, 319 F.Supp. 380 (D.C.S.D. West Va. 1970) expressed a view which the Respondent submits is proper:

> As to the first ground assigned to this court for relief — failure of the appellate court to give its reason, or reasons, for rejecting the appeal — petitioner's counsel has not referred us to any constitutional or legislative provision or rule of court that required the Supreme Court of Appeals of West Virginia to write an opinion or give any reason for its rejection of applications for appeals or writs of error, and this Court's own research has failed to reveal any. It will be presumed that the reviewing court performed its legal responsibility and gave the case proper consideration. *Scalf v. Bennett*, 408 F.2d 325 (8th Cir. 1969). Therefore, the point is deemed to be frivolous and will be given no further consideration.

Petitioner does not claim that the state supreme court has, in rendering its judgment on the record, committed an error of constitutional dimension. He simply claims that because the court has given no reasons for its decision, there are none. Generally speaking, a court of original jurisdiction will seldom if ever render a written opinion if no appeal is taken from its decision. Pennsylvania Rules of Appellate Procedure, Rule 1925 (Opinion in Support of Order), for example, provides that upon receipt of the notice of appeal the judge who entered the order appealed from, *if the reasons for the order do not already appear of record*, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found. This proce-

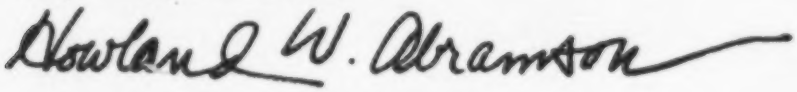
dural rule is for the benefit of the appellate court not for the litigant. Were it the case that a written opinion or written reasons were a constitutional right inuring to the benefit of the litigants, such a rule would necessarily be mandatory upon a court of original jurisdiction, whether or not the decision was appealed from and whether or not the record revealed the reasons.

CONCLUSION

Because the Petitioner makes no claim that the judgment of the state supreme court denying him reinstatement to the bar of the Supreme Court of Pennsylvania is constitutionally infirm, there is no substantial federal question. Constitutional questions shown by the record to have been raised in the state court give the United States Supreme Court jurisdiction to review the case notwithstanding that the appellate court of the state did not refer to the questions in its opinion. *International Harvester Co. v. Missouri*, 34 S.Ct. 859, 234 U.S. 199, 58 L.Ed.1276 (1914). The Supreme Court reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 76 S.Ct. 824, 351 U.S. 292, 100 L.Ed.1188 (1956), reh.den. 77 S.Ct. 21 352 U.S. 859, 1 L.Ed.2d 69. Further, where the highest court of a state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, the United States Supreme Court will not take jurisdiction to review the judgment. *Durley v. Mayo*, 76 S.Ct. 806, 351 U.S. 277, 100 L.Ed.1178 (1956) reh.den. 77 S.Ct.

22, 352 U.S. 859, 1 L.Ed.2d 69. Inferentially, the lack of an opinion itself does not raise a federal question. For these reasons, the Respondent respectfully submits that the Petition filed herein should be denied.

Respectfully submitted,



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Petitioner's Reply Brief

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 81-1688

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

IN THE MATTER OF ALBERT B. GERBER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October Term, 1981

To the Chief Justice & Justices of the Supreme Court of the United States

IN THE MATTER OF ALBERT B. GERBER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that the Petition for Writ of Certiorari be granted and offers as reasons therefore, the following:

ARGUMENT

THE APPELLEE'S COUNTER-STATEMENT OF THE MATERIAL FACTS IS IRRELEVANT AND MISLEADING

The Respondent has combed the record to assemble "facts" which disparage the appellant. Most of these facts relate to Petitioner's original criminal offense and its civil aspects and are totally unrelated to the issue either under the Pennsylvania Rules of disciplinary Enforcement, particularly Rule 218 on Reinstatement, or under the constitutional issues raised by the Petition for Certiorari.

While there is little purpose in a line by line analysis of the Counter-Statement, the Petitioner would simply point to a rather typical pejorative statement which is misleading. At the conclusion of the Counter-Statement, Respondent states: "The Hearing Committee further found that Petitioner did not completely divorce himself from his former law practice. Finally, the Hearing Committee specifically concluded that 'the facts are mixed'."

Because this discussion follows the statement relating to "a new Hearing Committee", presumably this statement was contained in the report of the *Second Hearing Committee*. Petitioner has attached as an Exhibit the complete Report of the Second Hearing Committee which is directly contrary to the Respondent's statement. The report of the Second Hearing Committee states:

> The Petitioner's evidence clearly established that he has not been engaged in the practice of law since his resignation. Although, he has an office in the same firm with which he was affiliated prior to his resignation, he is not held out to be a lawyer. His name has been removed from the door and the stationery of the firm. He does not see clients and does not give legal advice, even to members of his own

family. He even refused to attend a property settlement involving his daughter. His name is not in the legal directory.

In the approximately eight years since his resignation, there were only a few isolated incidents in which others referred to him as a lawyer. However, we are satisfied he had little or no control over those situations and took prompt and reasonable action to correct any mistaken impression that he was engaged in practice of law.

A careful reading of the report of the Second Hearing Committee discloses no conclusion that "the facts are mixed". To the contrary, the report indicates that the facts were *not* mixed and that based upon these facts and the law of the case (the Rules of the Supreme Court of Pennsylvania) the conclusion was inescapable that the Petitioner should have been reinstated.

THE RESPONDENT HAS FAILED TO ADDRESS THE RELEVANT CONSTITUTIONAL PRINCIPLES

In brief the Respondent's position is that it is not required to give reasons for a decision. However, the constitutional principles upon which the Petition for the Writ of Certiorari is based are not that an opinion was required but that the decision of the Respondent is in direct conflict with the decisions of this Court.

The Petition in this case is based upon three decisions of this Court, *Schware v. Board of Examiners of New Mexico*, 353 U.S. 232 (1957); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1970); *Application of Griffiths*, 413 U.S. 717 (1973). These three cases create a foundation upon which the constitutional law of admission to practice law is based. They hold that a state may not exclude a person from the practice of the law "in a manner or for reasons" which violate either the due process or equal protection clauses of the fourteenth amendment to

the U.S. Constitution. *Schware v. Board of Examiners, supra* at pp. 238-239.

Although the Respondent has made some effort to answer the constitutional arguments relating to "reasons that contravene the due process or equal protection clause" *id.*, the Respondent has no discussion whatsoever of the rule that a state cannot exclude an individual from practicing law "in a manner" which contravenes the relevant constitutional provisions. (It is noteworthy that the Respondent does not mention the three cases listed above.)

Petitioner contends simply that the Respondent has acted "in a manner" which violates well defined constitutional principles. The Respondent promulgated rules for the readmission to the bar of a formerly admitted attorney. Those rules include the hearing by three highly respected attorneys appointed by the Disciplinary Board. This Board, in turn, consists of nine members of the bar of Pennsylvania selected by the Supreme Court of Pennsylvania for their competency and knowledge in the field of legal ethics and related subjects. When the Hearing Committee unanimously recommended the Petitioner for readmission, the Board, one member not participating, approved unanimously. When the Respondent rejected his recommendation without furnishing any reason, its action constituted state action "in the manner" which "contravened the due process or equal protection clause of the fourteenth amendment". *Id.*

THE RESPONDENT HAS COMPLETELY IGNORED THE RECORD IN ATTEMPTING TO SET FORTH REASONS FOR ITS UNCONSTITUTIONAL ACTION

The weakness of Respondent's position is clearly demonstrated by the Brief in opposition to the Petition. The first three pages of the Brief consist primarily of

references to the Petitioner's original offense. It is only on page 4 that some "reasons" appear which might be the basis for the Respondent's action in the instant case. These alleged reasons consist of a statement that the Petitioner failed to correctly respond to a question in the reinstatement questionnaire, refused to answer interrogatories on the grounds that the answers might incriminate him, and did not completely divorce himself from his prior law practice.

It is significant to note that none of these reasons is referred to in the Report of the Second Hearing Committee! The report is attached hereto as an Exhibit and even a cursory examination reveals that the Respondent completely ignored this report and instead referred to evidence presented years earlier.

CONCLUSION

It is respectfully submitted that any fair review of the materials now before this Court demonstrates that the Respondent has violated elementary principles of justice guaranteed by the United States Constitution. The Respondent has treated the right to practice law as a matter of grace which it can grant or withhold at its whim and pleasure. The decisions of this Court do not permit such conduct. The Writ prayed for therefore should be granted.

Respectfully submitted,

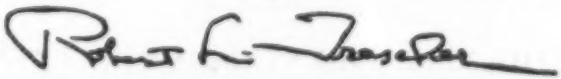

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EXHIBIT

BEFORE
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

IN THE MATTER OF	:	NO. 173 MISCELLANEOUS DOCKET
	:	NO. 19
	:	
	:	SUPREME COURT
ALBERT B. GERBER	:	NO. 2 DB 76

REPORT OF THE SECOND HEARING COMMITTEE

I. PROCEDURAL HISTORY

Petitioner's resignation from the Courts of Pennsylvania was accepted by the Supreme Court on April 28, 1972.

The resignation followed conviction in October 1971 of Petitioner by the Federal Courts for violation of the Federal Securities Act for which he received a sentence of probation for five years from the United States District Court for the Eastern District of Pennsylvania. Petitioner's probation was terminated in October 1975.

A Petition for Reinstatement was filed January 26, 1976. On March 11, 1976, the matter was referred for a reinstatement hearing to a Hearing Committee consisting of Mercer D. Tate, Esquire, Chairman, Ricardo C. Jackson, Esquire and Edward Greer, Esquire.

The reinstatement hearing was stayed while the issues of the authority of the Disciplinary Board, in its discretion to conduct a reinstatement hearing in private, was tested before the Supreme Court of Pennsylvania. *Philadelphia Newspapers, Inc. and Anthony Lame v. The Disciplinary Board of the Supreme Court of Pennsylvania and Albert Gerber,* 468 Pa. 382, 363 A.2d 779 (1976).

Hearings by the original committee were then held on September 14, 1976, September 20, 1976 and October 18, 1976. Petitioner was represented by counsel.

On September 28, 1977, the Hearing Committee filed its report recommending that Petitioner be reinstated. By a letter dated October 14, 1977, Chief Disciplinary Counsel advised The Disciplinary Board he would not file exceptions to the report of the Hearing Committee. No exceptions were filed by the Petitioner.

In November 1977, the Disciplinary Board recommended that Petitioner be reinstated.

On January 9, 1978, the Supreme Court of Pennsylvania, in an Order of that date and without opinion, rejected the recommendation of the Disciplinary Board and denied the petition for reinstatement. Mr. Justice Pomeroy and Mr. Justice Manderino dissented without opinion stating only that they would accept the recommendation of the Board.

In December 1978, Petitioner filed a second Petition for Reinstatement. The case was, in due course, submitted to the instant committee consisting of Perry S. Bechtle, Esquire, Chairman, Herbert J. Hutton, Esquire, and Louis W. Fryman, Esquire.

The instant committee met and took testimony on April 11, 1979, April 18, 1979 and April 17, 1980. The transcript of these proceedings begins with page number 228 which is a continuation of the page numbers from the first hearing. Petitioner was represented by counsel before this committee.

II. APPLICABLE RULES OF DISCIPLINARY ENFORCEMENT

Prior proceedings were conducted under Rule 17-18 which is now Rule 218, Pennsylvania Rules of Disciplinary Enforcement.

The issue before the instant committee is set forth in Rule 218(3)(i) and (ii) which provides:

"(3) The hearing committee shall promptly schedule a hearing at which:

(i) A disbarred or suspended attorney shall have the burden of demonstrating by clear and convincing evidence that such person has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth and that the resumption of the practice of law within the Commonwealth by such person will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest.

(ii) A formerly admitted attorney who has been on inactive status shall have the burden of demonstrating that such person has the moral qualifications, competency and learning in the law required for admission to practice in the Commonwealth."

III. DISCUSSION

The Petitioner's evidence before this committee related primarily to his activities since the date of the last hearing.

The history of the case is set forth above and will not be reiterated herein.

The Petitioner's evidence clearly established that he has not been engaged in the practice of law since his resignation. Although, he has an office in the same firm with which he was affiliated prior to his resignation, he is not held out to be a lawyer. His name has been removed from the door and stationery of the firm. He does not see clients and does not give legal advice, even to members of his own family. He even refused to attend a property settlement involving his daughter. His name is not in the legal directory.

In the approximately eight years since his resignation, there were only a few isolated instances in which others referred to him as a lawyer, however, we are satis-

fied he had little or no control over those situations and took prompt and reasonable action to correct any mistaken impression that he was engaged in the practice of law.

The panel is also satisfied that Petitioner has met his burden in establishing that he has the competency and learning in the law for readmission. During the period of his resignation, he has kept abreast of changes in the law by doing research and brief writing for other lawyers and regularly reviewing advance sheets, and legal periodicals including law reviews.

The evidence also establishes that Petitioner has the moral qualifications for readmission and that readmission will not be detrimental to the integrity and standing of the bar or to the administration of justice. Petitioner enjoyed a substantial reputation prior to his resignation as a lawyer of extraordinary intelligence and industry. He recognizes the acts to which he pled guilty as being wrong and serious violations of the law. He has since his resignation, been active in community affairs. He is, among other accomplishments, a commander of a Disabled Veterans Post and a committeeman in his division.

Disciplinary counsel explored several areas during the hearing. Disciplinary counsel extensively reviewed and questioned petitioner regarding his tax returns particularly personal property tax returns. Petitioner holds stock in numerous companies and the evidence did not establish any misconduct in connection with those returns.

Petitioner has moved from Philadelphia to Montgomery County and although he filed personal property tax returns required by Philadelphia County, he had not filed a personal property tax in February 1979 which was required by Montgomery County. Petitioner testified that he was not aware that Montgomery County had a personal property tax. At the time of the hearing, the return was two months overdue and the evidence tended

to establish that the tax due would have been approximately $100. Petitioner stated that he would file that return. The matter was not pursued by counsel in subsequent hearings. We found the Petitioner's testimony to be credible.

Following Petitioner's conviction, certain complex civil litigation arose in which a civil judgment was rendered against Petitioner in a substantial amount. That litigation was settled with the adverse party. Disciplinary counsel extensively inquired into the settlement with a view toward determining whether or not Petitioner had made proper disclosure of Petitioner's assets which were a factor in reaching the settlement. The panel is satisfied that the evidence does not indicate that Petitioner did anything improper in connection with the settlement.

IV. FINDINGS OF FACT

The panel makes the following findings of fact:

1. Petitioner resigned from the Supreme Court of Pennsylvania April 28, 1972 following a plea of guilty in the United States District Court to charges of various federal securities violations.

2. Petitioner enjoyed a reputation prior to his resignation from the Supreme Court of Pennsylvania as a law student and later as a lawyer of extraordinary intelligence.

3. Petitioner was a partner in a law firm before his resignation and after his resignation, continued to occupy the same office, but paid rent therefore.

4. Petitioner since the date of his resignation, has not held himself out to be an attorney, nor practiced law.

5. Petitioner, during the period of his resignation, has kept abreast of changes in the law by doing legal research, preparing briefs and memoranda, for other attorneys under a corporate entity known as Association for Research, Inc. at the rate of $25.00

per hour; regularly reviewed advance sheets and legal periodicals; and served as Administrative Director of the First Amendment Lawyers Association.

6. Petitioner has authored the following books and articles:

"The Lawyers" (1972)

"Joy of Dieting" (1973)

"The Bashful Billionaire" (a biography of Howard Hughes)

"The Hijacking of the White House" (1977)

Weekly columns on censorship, Man's Inhumanity to Man, and unusual and interesting legal problems in National News Extra, Candid Press, National Tattler and others. Articles on Howard Hughes in Family Weekly.

Series of columns for a Chicago tabloid.

Numerous long and short unpublished scripts.

7. Petitioner is married with three children and three grandchildren.

8. Petitioner is in his late 60's but in excellent health engaged in various athletic pursuits particularly handball and volley ball.

9. Petitioner remains active in community affairs including the Disabled American Veterans and was elected Commander of his Post; and is a committeeman in his division.

10. Petitioner stated that he did not benefit personally from the transactions which resulted in his conviction and there is no evidence to the contrary.

11. There is no evidence that Petitioner during the period of his resignation, engaged in any illegal, unethical or improper conduct nor are there any pending investigations or disciplinary actions against Petitioner.

V. CONCLUSIONS OF LAW

The panel finds that Petitioner has by clear and convincing evidence met his burden of proof for reinstatement under the Rules of Disciplinary Enforcement.

VI. RECOMMENDATION

The panel unanimously recommends that Petitioner be reinstated.

Date: Feb. 23, 1981

PERRY S. BECHTLE, *Esquire*
Chairman

HERBERT J. HUTTON, *Esquire*
of the Committee

LOUIS W. FRYMAN, *Esquire*
of the Committee